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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1241

ADULT FILM ASSOCIATION OF AMERICA, a Texas corporation; ENTERTAINMENT VENTURES, INC., a California corporation; DAVID FRIEDMAN and VINCENT MIRANDA, on Behalf of Themselves and All Other Persons Similarly Situated,

Petitioners,

vs.

THE HONORABLE MALCOLM M. LUCAS, District Judge of the United States District Court for the Central District of California,

Respondent,

WILLIAM B. SAXBE, individually and as Attorney General of the United States; and WILLIAM D. KELLER, individually and as United States Attorney for the Central District of California,

Real Parties in Interest.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners' Reply to Memorandum for the United States in Opposition to Petition for a Writ of Certiorari.

1. The Government does not deny that petitioners have raised a substantial question as to the constitutionality of the federal obscenity statutes, Title 18 United States Code §§ 1461, 1462 and 1465, nor does the Government deny that petitioners have standing to raise the constitutional question. Nevertheless, the Gov-

ernment opposes the grant of a writ of certiorari, contending that:

(a) *Hamling, et al. v. United States,* No. 73-507, "will resolve the question the petitioners seek to compel a three-judge court to consider"; and

(b) the question of the constitutionality of the federal obscenity statutes "does not pose a constitutional issue appropriate for determination by a three-judge court" because the issue "is one which would properly be considered in the context of a defense of a criminal prosecution. . . ."

2. *Hamling, et al. v. United States,* No. 73-507, will *not* resolve *all* the questions the petitioners seek to compel a three-judge court to consider.

It is true that petitioners herein do contend that the federal obscenity statutes are unconstitutionally vague as applied to pre-*Miller* conduct. Petitioners also contend however that the statutes are unconstitutionally vague as applied to post-*Miller* conduct. In their Complaint, petitioners sought an injunction restraining the Attorney General of the United States and the United States Attorney for the Central District of California "from prosecuting or threatening to prosecute [petitioners] (including members of the class) under Title 18 United States Code §§ 1461, 1462 and 1465 for conduct engaged in by [petitioners] (including members of the class) subsequent to June 21, 1973." [APPENDIX C to Pet. for Writ of Cert., pp. 23-24]. Petitioners also sought a declaration that the Attorney General of the United States and the United States Attorney for the Central District of California may not initiate any criminal prosecutions under said statutes without first bringing a civil proceeding to determine whether a chal-

lenged film is obscene under any of said statutes. [APPENDIX C to Pet. for Writ of Cert., p. 24].

It is thus apparent that petitioners herein have raised substantial constitutional questions which are not encompassed in the questions before the Court in *Hamling, et al. v. United States,* No. 73-507.

3. The Government is in error in arguing that the question of the unconstitutionality of the federal obscenity statutes can be raised *only* as a defense to a criminal prosecution. The answer to the Government's contention is found in *Reed Enterprises, Inc. v. Corcoran,* 354 F.2d 519 (D.C. Cir. 1965), where the allegations concerning the appropriateness of equitable relief were similar to the allegations in the Complaint herein. In *Reed,* the Court said:

> "The Government's suggestion that petitioners have an adequate remedy at law in the criminal proceedings now pending against them, while perhaps appropriate in cases outside the First Amendment area where a single prosecution is contemplated, is unavailing here. The Government has not even denied that it contemplates multiple prosecutions. . . . Moreover, under some circumstances even a single 'criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. * * * The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases.' * * * Where the plaintiff complains of chills and threats in the protected First Amendment area, a court is more disposed to find that he is presenting a real and not an abstract controversy." (354 F.2d at 523).

For the foregoing reasons, a writ of certiorari should issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit. That court should be ordered to direct the respondent court to take the necessary steps for the convening of a three-judge court in accordance with the provisions of Title 28 United States Code §§ 2282 and 2284.

Respectfully submitted,

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